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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 361

MASTER METAL STRIP SERVICE, INC. AND MARTIN J. GOSSEN,

Petitioners,

vs.

PROTEX WEATHERSTRIP MFG. CO., A CO-PARTNERSHIP CONSISTING OF JOHN W. MOUSTAKAS, ALIAS JOHN WEST, CATHERINE MOUSTAKAS, AND LOUIS MOUSTAKAS,

Respondent.

REPLY BRIEF FOR PETITIONERS.

Re Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

I.

Respondent Asserts That the Decision of the Court of Appeals Is Based Entirely Upon and Relates Solely to the Particular Facts of the Case Below and Presents No Unique Question of Public Interest or Importance.

No decision which for the first time decides the novel and important question presented by this petition, could

be said to be a decision presenting no question of public importance and one which relates solely to the particular facts of the case below.

The decision of the Court of Appeals for the Seventh Circuit is far-reaching. The number of patent licenses affected thereby cannot be estimated.

Nor does a decision of a Court of Appeals relate solely to the particular facts of the case below and present no question of public importance, where the ultimate result of such decision is to create confusion and doubt in the minds of patent owners and their licensees with respect to whether they are to be subjected to a charge of violation of the Federal Anti-Trust Laws by joining as co-plaintiffs in a suit for patent infringement should the patent license on which they bottom their right to join as co-plaintiffs be held to be a license which does not extend to the patent claims sued upon but rather to those claims of the patent which were not in issue.

II.

Respondent Asserts That There Is No Conflict of Decision Between the Court of Appeals for the Seventh Circuit and the Decision of Any Other Court as to the Facts and Issues in the Case Below.

The question presented by the petitioners herein, so far as petitioners can determine, *has not been determined by this or any other court.* Respondent does not contend to the contrary. *The question presented is one of first impression.* It is to the interest of the public, particularly the members of the patent profession and others dealing or concerned with patents, that the question be settled by this Court to avoid a conflict of decisions and unnecessary and costly future litigation.

III.

It Is Argued by Respondent That Neither the Trial Court Nor the Court of Appeals Construed the License as Being Limited to the Claims Not Sued Upon.

On page 16 of respondent's brief there is quoted a portion of Finding of Fact 7 (R. 326). In quoting such portion of Finding of Fact 7, the respondent does not emphasize the recital in such Finding that while the license was not for the right to manufacture and sell the patented combination defined in and by claims 1 and 2 of the patent in suit, which were sued upon, such license granted the right to manufacture and sell weatherstrip and sash balance devices

> **"embodying the inventions shown, described and claimed in this patent [the patent in suit]."**

While the trial court in Finding of Fact 7 did not recite the claims of the patent which that court had in mind as defining the inventions which are to be embodied in the weatherstrip and sash balance devices to be manufactured under the license, the patent informs us that those inventions are claimed in claims 5 and 6 of the patent in suit. Therefore, the trial court by Finding of Fact 7 (R. 326) did by its decision limit the license to claims 5 and 6 wherein the inventions to be embodied in the devices manufactured and sold under the license are claimed.

IV.

Respondent Argues That Claims 5 and 6 (Which Define the Weatherstrip and Sash Balance Devices to Be Manufactured Under the License) Were Not in Issue Before the Trial Court.

For a determination of the question presented, it is of no moment that claims 5 and 6, which define the inventions to be embodied in the weatherstrip and sash balance devices manufactured and sold under the license, were not in issue before the lower court on the issues of infringement and validity. The question presented by the petition is whether or not the license, which by the trial court has been interpreted as one not extending to the claims sued upon, but rather as a license and right to manufacture and sell devices embodying the inventions claimed in other claims of that patent which were not in suit, violates the Federal Anti-Trust Laws.

Conclusion.

Petitioners repeat that the question presented by their petition is novel; that it has never been decided by this or any other court; that it is of great public importance not only because it involves an extension for the first time of the Federal Anti-Trust Laws to include within their folds a license such as is here involved, but also because, if left unsettled by this Court, great confusion and uncertainty would be likely to result, as heretofore stated.

In the march of jurisprudence toward the goal of perfection and understanding, this Court has contributed greatly to the reduction of litigation by unhesitantly settling novel questions of first impressions and of public importance, thereby avoiding possible conflict of decisions

between Courts of Appeals and unnecessary, lengthy and costly litigation.

Petitioners therefore respectfully submit that their petition for writ of certiorari to the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

MASTER METAL STRIP SERVICE, INC.,
and MARTIN J. GOSSEN,
Petitioners,

By CLARENCE E. THREEDY,
Their Attorney.

NUNZIO GIAMBALVO,
Of Counsel.

Chicago, Illinois,
December 6, 1948.